APPENDIX A — ORDER OF COURT IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JULY 20, 1990

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the MOTOR VESSEL ELIZABETH and as Charterer of BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

ORDER

AND NOW, this 20th day of July, 1990, upon consideration of Consolidation Coal Company's ("Consol") Motion for Approval of Limitation Bond and Stipulation for Costs and for an order Directing Issuance of the Required Notice and for Issuance of an Injunction with respect to any and all losses, damages, or injuries occasioned or incurred by any person or resulting from an alleged accident involving George Newman, which occurred on or about April 27, 1989 while he was employed by Consol, and referred to in Consol's Complaint for Exoneration From or Limitation of Liability filed herein, and it appearing to the court that (1) the combined value of Consol's interest in the towboat M/V Elizabeth and Barge No. MC 1029 and their freight then pending was approximately $120,000.00, (2) the claims which have been or may be asserted against Consol may exceed the value of its interest in said towboat and barge and the freight then pending, and (3) Consol filed a Limited Bond of $120,000.00 plus interest and has further filed a Stipulation for Costs in the amount of $250.00, IT IS HEREBY ORDERED that the Limitation Bond is

approved; however, such approval is without prejudice to the due appraisal of Consol's interest in said towboat M/V Elizabeth and Barge No. MC 1029 and their freight then pending, if so Ordered, and that in the meantime, any party may apply to have the amount of the Limitation Bond increased or diminished as the Court may direct.

IT IS FURTHER HEREBY ORDERED that a notice in the form attached hereto as Exhibit "A" shall issue out of and under the seal of this Court, citing all persons, firms, and corporations who have or allege to have claims for any and all losses, damages, or injuries occasioned or arising out of the alleged accident involving George Newman which occurred on or about April 27, 1989, to file their respective claims with the Clerk of this Court or be forever barred, and to serve copies of said claims on Consol's attorneys, Thomas A. Smock, Esquire and Leonard Fornella, Esquire, on or before September 15, 1990, and to make due proof of their claims as this Court may hereafter direct, subject to the right of any such persons or concerns to controvert or question said claims, with liberty also to such claimants who have duly filed claims to answer the Complaint filed herein by filing an Answer with the Clerk of this Court on or before September 15, 1990.

IT IS FURTHER HEREBY ORDERED that pursuant to Local Admiralty Rule (g)(3), the aforesaid public notice shall be given by publication thereof in the *Pittsburgh Press,* published in Pittsburgh, Pennsylvania, and that such notice shall be published once a week for four successive weeks prior to the date fixed herein for filing claims.

IT IS FURTHER HEREBY ORDERED that not later than the date of the second publication, Consol shall mail or cause

copies of said notice to be mailed to every person or concern known to have made any claim against them or against the towboat M/V Elizabeth or Barge No. Me 1029, arising out of or connected with the aforesaid accident which allegedly occurred on or about April 27, 1989.

IT IS FURTHER HEREBY ORDERED that the institution or further prosecution of any and all suits, actions, or legal proceedings against Consol or the towboat M/V Elizabeth or Barge No. MC 1029, arising out of or connected with the aforesaid accident of April 27, 1989, except in this proceeding for exoneration from or limitation of liability, be and the same hereby are stayed and enjoined.

IT IS FURTHER HEREBY ORDERED that service of this Order shall be made by Consol or its designee.

s/ Alan N. Bloch
UNITED STATES DISTRICT JUDGE

APPENDIX B — CLAIMANT'S MOTION TO VACATE OR DISSOLVE INJUNCTION AND TO STAY

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration from or Limitation of Liability

CLAIMANTS' MOTION TO VACATE OR DISSOLVE INJUCTION AND TO STAY

Claimants, George Newman and Suzanne M. Newman, his wife, respectfully move this Honorable Court to dissolve or vacate the Injunction entered in this case and to stay the prosecution of this case in this Honorable Court. In support thereof, Mr. and Mrs. Newman allege:

1. Mr. and Mrs. Newman seek to recover against Consolidation Coal Company under the Jones Act, 46 U.S.C. §688, and for breach of warranty of seaworthiness. Alternatively, Claimants seek to recover for negligence under Section 5(b) of the Longshoreman and Harbor Workers' Compensation Act, 33 U.S.C. §905(b).

2. Mr. Newman suffered severe personal injuries while working on Consol's vessels on or about April 27, 1989.

3. Mr. and Mrs. Newman filed suit against Consolidation Coal Company on January 17, 1990, in the Court of Common Pleas of Allegheny County, Pennsylvania, at GD 90-00980.

Appendix B

4. On or about July 20, 1990, Consol filed this action to limit its liability and obtained that same date an Injunction barring the Newmans from prosecuting their prior action in State Court.

5. In that same Injunction, the Court ordered that all claims must be filed on or before September 15, 1990, or in default thereof such claims be forever barred.

6. The Honorable Court's Injunction was duly and timely advertised by Consol and proof thereof filed.

7. No claimants other than Mr. and Mra. Newman have appeared. Therefore, this is a single claimant's case, Mrs. Newman's consortium rights being derivative of her husband's.

8. To obtain the Order Mr. and Mrs. Newman now request, Claimants and their counsel hereby stipulate, intending to be legally bound, (1) that this Honorable Court has sole and exclusive jurisdiction of any and all issues relating to Consol's attempt to limit its liability arising from Mr. Newman's aforesaid injuries; (2) Mr. and Mrs. Newman and Mr. Hammer also stipulate that no State Court judgment will be res judicata as to any limitation fact or issue in the limitation proceeding; and (3) finally, Mr. and Mrs. Newman and Mr. Hammer stipulate that they will confine the Newmans' action to the case pending in the Court of Common Pleas of Allegheny County, Pennsylvania, cited in paragraph 3 above.

9. There will be no prejudice to Consol by the granting of this Motion:

Appendix B

(a) If Consol secures a defense judgment in State Court, the case is over without further requiring any action of this Honorable Court.

(b) If Mr. and Mra. Newman win a judgment less than the limitation fund in State Court, again this Honorable Court will not be required to take any action;

(c) If Mr. and Mrs. Newman obtain a judgment in State Court in excess of the limitation fund, all limitation issues will be decided in this Honorable Court.

10. Mr. and Mrs. Newman, on the other hand, will be severely prejudiced if the Injunction remains in effect because they will be deprived of their right to prosecute this Case in State Court granted to them by Congress in the Savings to Suitors clause, 28 U.S.C.A. §1333 (Suitors in Admiralty are entitled to a common law remedy where the common law is competent to give it). Mr. and Mrs. Newman will further be severely prejudiced if their Motion is not granted because they will be deprived of their right to a jury trial granted to them by the Constitution of the United States of America.

11. The valuable time and assets of this Honorable Court will be conserved if the Newmans' Motion is granted and the Injunction vacated or dissolved and the case stayed. This Honorable Court may well be spared any further proceedings in this case and the case may be removed from this Honorable Court's Docket without further action.

Appendix B

WHEREFORE, Claimants George Newman and Suzanne M. Newman, his wife, respectfully move this Honorable Court to dissolve or vacate the Injunction entered on July 20, 1990, and to stay any further action in this Proceeding until after the termination of the proceedings in the Court of Common Pleas of Allegheny County, Pennsylvania.

Respectfully Submitted,

s/ Paul L. Hammer
Paul L. Hammer
Attorney for Claimants

APPENDIX C — RESPONSE TO CLAIMANTS' MOTION TO VACATE OR TO DISSOLVE INJUNCTION AND TO STAY AND SUPPORTING MEMORANDUM OF LAW

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as OWNER of the MOTOR VESSEL ELIZABETH and as Charterer of BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY.

RESPONSE TO CLAIMANTS' MOTION TO VACATE OR TO DISSOLVE INJUNCTON AND TO STAY AND SUPPORTING MEMORANDUM OF LAW

AND NOW comes Complainant, Consolidation Coal Company (hereinafter "Consol") by and through its undersigned counsel, and hereby responds to the motion of Claimants, George Newman and Suzanne M. Newman, to vacate or dissolve injunction and to stay this proceeding, averring as follows:

RESPONSE TO MOTION

1. With respect to the averments contained in paragraph 1 of Claimants' motion, it is admitted that Claimants have filed a Complaint against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania (hereinafter "state court suit"), seeking to recover damages under the Jones Act, 46 U.S.C. Section 688, and also alleging the unseaworthiness of vessels. It is also admitted that Claimants have also filed a formal claim

in this proceeding on the same bases. However, it is denied that Claimants have asserted any affirmative claim for recovery based on negligence under Section 5(b) of the Longshoremen and Harborworker's Compensation Act, 33 U.S.C. 905(b) in their the state court suit, although such a formal claim has ostensibly been made by Claimants in this proceeding.

2. With respect to the averment contained in paragraph 2 of Claimants' motion, it is admitted that Mr. Newman was involved in an accident on or about April 27, 1989 while employed by Consol. The remaining averments contained in paragraph 2 of Claimants' motion are denied as stated.

3. With respect to the averments contained in paragraph 3 of Claimants' motion, it is admitted that Claimants have filed suit against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania at No. GD 90-00980, which was served upon Consol on January 26, 1990. Consol is without knowledge or information sufficient to form a belief as to the truth of Claimants' averment as to the date on which said suit was filed, and thus said averment is denied.

4. The averments contained in paragraph 4 of Claimants' motion are denied as stated. On July 20, 1990, Consol filed the instant action seeking both exoneration from or limitation of liability. It is admitted that on July 20, 1990, this Court entered an Order in this action. However, the terms of that Order speak for themselves, and thus no response to Claimants' attempt to paraphrase said Order is required.

5. With respect to the averments contained in paragraph 5 of Claimants' motion, Consol avers that the terms of this Court's Order of July 20, 1990 speak for themselves, and thus

no response to Claimants' attempt to paraphrase said Order is required.

6. With respect to the averments contained in paragraph 6 of Claimants' motion, it is admitted that Consol duly and timely published, served and/or filed all advertisements, notices, proofs and other documents or pleadings required by the statutes, orders, rules and/or regulations applicable to this action.

7. The averments contained in paragraph 7 of Claimants' motion are admitted in part and denied in part. It is admitted that no claimants other than the Newmans have filed formal claims in this action. However, it is denied that Mrs. Newman has any legally cognizable claim for derivative consortium rights.

8. Consol avers that no response is required to the averments contained in paragraph 8 of Claimants' motion.

9. Consol avers that no response is required to the averments contained in paragraph 9 of Claimants' motion. In the event a response is deemed to be required, then Consol avers that it will be prejudiced by the granting of this Consol's action herein is not only for limitation but also for exoneration from liability, and further action may be necessary on the exoneration claim.

10. Consol avers that no response is required to the averments contained in paragraph 10 of Claimants' motion.

11. The averments contained in paragraph 11 of Claimants' motion are denied as stated.

Appendix C

MEMORANDUM OF LAW IN RESPONSE TO CLAIMANTS' MOTION

Claimants' motion to vacate or dissolve injunction and to stay is actually two motions, and Consol will hereinafter discuss the relative merits of these motions separately.

Claimants filed an action against Consol in the Court of Common Pleas of Allegheny County, Pennsylvania at No. GD 90-00980 (state court suit), which was served on Consol on January 26, 1990. Claimants allege in their state court suit that George Newman was a seaman and that he was injured after being involved in an accident on or about April 27, 1989 while employed by Consol.

On July 20, 1990, Consol filed the instant action seeking exoneration from or limitation of liability with respect to Mr. Newman's accident of April 27, 1989, pursuant to the provisions of 46 U.S.C. Sections 181, et seq. At that time, Consol also filed an appropriate Limitation Bond in the amount of $120,000.00, representing the aggregate value of Consol's interests in the M/V Elizabeth and Barge No. MC 1029, the vessels on which Mr. Newman claims to have been working at the time of his accident.

Upon the filing of Consol's Complaint herein, and in order to properly protect this Court's admiralty jurisdiction over this matter, this Court entered an Order on July 20, 1990 which, among other things, ordered on page 3 that the

> institution or further prosecution of any and all suits, actions, or legal proceedings against Consol or the M/V Elizabeth or Barge No. MC 1029, arising

> out of or connected with the aforesaid accident of April 27, 1989, except in this proceeding for exoneration from or limitation of liability, be and the same hereby are stayed and enjoined.

Thus, this Court's Order of July 20, 1990 effectively enjoined any further prosecution of the state court suit which Claimants had filed previously.

Consol subsequently published all required notices and advertisements, and filed all required pleadings and proofs in accordance with the applicable statutes, orders, rules and regulations governing actions for exoneration from or limitation of liability. Thereafter, the only claim filed in this proceeding was one filed on behalf of the Newmans, Claimants herein. Claimants now move this Court to vacate or dissolve the stay of July 20, 1990 so that they may proceed with the prosecution of their state court suit. Claimants have also asked this Court to enter a stay as to all further proceedings *in the instant action* wherein Consol seeks exoneration from or limitation of liability, pending final resolution of the state court suit.

I. *Claimants' Motion to Vacate or Dissolve Injunction*

In *Langnes v. Green*, 282 U.S. 531, 51 S.Ct. 243, 75 L.Ed. 520 (1931) and in *Ex Parte Green*, 286 U.S. 437, 52 S.Ct. 602, 76 L.Ed. 1212 (1932), the Supreme Court announced that when a petition for exoneration from or limitation of liability was pending within the admiralty jurisdiction of a federal court, and where the only claim in the limitation proceeding was filed by a party who had previously filed a suit in a state court, then the federal district court should dissolve its stay or injunction as to the state court proceeding, but *only if* certain requirements were first met.

Appendix C

Subsequent to the *Green* decisions, various federal courts attempted to define precisely the factors which a claimant must first meet before the stay or injunction as to the state court proceeding could be lifted. The result of those decisions was the development of a rule requiring a claimant to file a series of stipulations when seeking to lift a stay. These stipulations were summarized by Professors Gilmore and Black in *The Law of Admiralty,* Second Edition (1975), at pages 871-872, as follows:

> The procedure which has been worked out under the *Green* cases is as follows: a single claim plaintiff who wishes to prosecute a common law action after the shipowner has filed a petition for limitation must
>
> a) file his claim in the limitation proceeding;
>
> b) where a stipulation for value has been filed in lieu of the transfer of the ship to a trustee, concede the sufficiency in amount of the stipulation;
>
> c) consent to waive any claim of res judicata relevant to the issue of limited liability based on any judgment obtained in the state court;
>
> d) concede petitioner shipowner's right to litigate all issues relating to limitation in the limitation proceeding.

(Citations omitted). *See also, Complaint of Businelle Towing Corp.*, 539 F.Supp. 609, 611 (M.D. La. 1982); *S & E Shipping Corp. v. Chesapeake and Ohio Railway Company,* 678 F.2d

636, 643 (6th Cir. 1982); *Newton v. Shipman*, 718 F.2d 959, 962 (9th Cir. 1983); *Jefferson Barracks Marine Service v. Casey*, 763 F.2d 1007, 1010 (8th Cir. 1985); *Valley Line Company v. Ryan*, 771 F.2d 366, 373 (8th Cir. 1985).

All of the courts which have addressed this issue are in uniform agreement that stipulations a), b), and d), above, are absolutely necessary before a stay of other proceedings may be lifted. Admittedly, however, there is a question as to the necessity of requirement b), that being that a claimant concede the sufficiency of the amount placed in the limitation fund. The split of authority with regard to this factor will be discussed more fully below, after Consol discusses whether the stipulations which have been made by Claimants herein at least satisfy the other three requirements.

Requirement (a) — File a Claim in the Limitation Proceeding

Consol concedes that Claimants have filed a formal claim in this action with respect to Consol's Complaint seeking exoneration from or limitation of liability, and therefore Claimants have met this requirement.

Requirement (c) — Consent to Waive any Claim of Res Judicata Relevant to the Issue of Limited Liability Based on any Judgment Obtained in the State Court

In paragraph 8 of their motion, Claimants and their counsel have agreed to "stipulate that no State Court judgment will be res judicata as to any limitation fact or issue in the limitation proceeding." Although this stipulation may seem to satisfy the required res judicata waiver on first blush, Consol submits that a closer reading suggests that the stipulation, as worded, does not satisfy the requirement.

Appendix C

In the above regard, Claimant's stipulation only concedes that no state court judgment will be asserted as res judicata as to any "limitation fact or issue" in the limitation proceeding. However, the applicable decisions on this issue generally require that a claimant stipulate that "*no res judicata arguments* will be made based upon any state court judgment. " *Complaint of Midland Enterprises, Inc.*, 886 F.2d 812, 814 (6th Cir. 1989) (emphasis added). *See also, In Re Red Star Barge Line, Inc.*, 160 F.2d 436, 438 (2d Cir. 1947) where the court required the claimant to waive any claim of res judicata relevant to the issue of limited liability and based on any judgment obtained in the state court action.

Consol is not uncertain as to what Claimants mean or intend when they limit their res judicata waiver to any "limitation fact or issue". While not intending to engage in semantical gymnastics, Consol nevertheless would suggest that Claimants' attempt to restrict their stipulation regarding res judicata only to "limitation facts or issues" is too narrow in the face of the decisional authorities which require a waiver of *any* claim of res judicata with respect to *any* issue relevant to the proceeding. Furthermore, Consol has sought both an exoneration from or a limitation of its liability in this action. To the extent Claimants' stipulation only applies to "limitation facts or issues", but not to issues relative to exoneration, then it does not properly protect this Court's admiralty jurisdiction over all issues in this proceeding.

Thus, to the extent that Claimants' stipulation is an attempt to waive res judicata, but only as to *certain* issues which may arise in this proceeding, then the stipulation is unduly narrow, and does not comport with the required language necessary to lift the stay as to Claimants' state court suit.

Appendix C

Requirement (d) — Concede Consol's Right to Litigate all Issues Relating to Limitation in the Limitation Proceeding

Claimants have stipulated in paragraph 8 of their motion that this Court "has sole and exclusive jurisdiction of any and all issues relating to Consol's attempt to limit its liability arising from Mr. Newman's aforesaid injuries." Generally speaking, this stipulation would appear to satisfy the requirement necessary to protect this Court's admiralty jurisdiction to decide any and all issues in this proceeding. However, the stipulation does not specifically concede that Consol will have the continuing *right* to litigate any and all issues relative to this proceeding; but merely that this Court will have sole and exclusive jurisdiction over those issues. Additionally, the stipulation does not recognize that Consol seeks herein both an exoneration from or a limitation of its liability. If this Court were to formally and affirmatively interpret Claimants' stipulation as conceding that Consol will continue to have the *right*, following the lifting of the stay, to litigate any and all issues relative to exoneration or limitation solely and exclusively within this Court, then this particular requirement could be satisfied.

Requirement (b) — Concede the Sufficiency in Amount of the Stipulation

Commensurate with the filing of its Complaint herein, Consol filed an Affidavit of Value and a Limitation Bond securing the value of the M/V Elizabeth and Barge No. MC 1029 as an alternative to tendering the vessels themselves. The limitation fund as to those vessels has been offered at the combined aggregate value of $120,000.00. Part (b) of the generally quoted four part test set forth in *Gilmore and Black*, above, would therefore require Claimants herein to concede

that the $120,000.00 value of the vessels in the limitation fund is sufficient and proper. Claimants have not made any such stipulation or concession in their motion.

Consol candidly admits, however, that various district and circuit courts are split in their determination of whether this concession is absolutely required before a stay of a state court action may be lifted. In that regard, certain courts addressing this issue have cited generally the four part test set forth in *Gilmore and Black* as being required in its entirety. *See e.g., S & E Shipping Corp. v. Chesapeake and Ohio Railway Company, supra*; *Jefferson Barracks Marine Service v. Casey, supra; Valley Line Company v. Ryan, supra;* and *In Re Red Star Barge Line, Inc., supra.* More specifically, in *Complaint of Tropigas Carriers, Inc.*, 603 F. Supp. 940 (S.D. Fla. 1985), the district court, when lifting its stay, specifically ordered the claimant to file a statement conceding the sufficiency and amount of the stipulation for value filed by the shipowner in the limitation action. Thus, a literal reading of the above decisions would indicate that Claimants' stipulation herein lacks the necessary concession regarding the sufficiency of the value of the limitation fund herein, and would therefore not support their request to lift the stay.

On the other hand, there are number of decisions which discuss in depth this particular requirement, and have rejected the reasoning that a claimant must stipulate to the value of the limitation fund before a stay may be lifted. *See, e.g., Complaint of Midland Enterprises, Inc., supra.; In Re Mr. Wayne,* 729 F.Supp 1124 (E.D. La. 1989); *Kattelman v. Otis Engineering Corp.*, 701 F.Supp. 560 (E.D. La. 1988); *Complaint of North Lubec Manufacturing and Canning Company,* 647 F.Supp. 1132 (D. Me. 1986).

However, it is important to not that even in those decisions holding that a claimant need not stipulate to the value of the limitation fund, nevertheless, those courts have generally required that the other stipulations which the claimant did make include a concession, generally or specifically, that the valuation issue remained exclusively an admiralty question and was reserved for determination by the federal court in the limitation proceeding. *See, e.g., Complaint of Midland Enterprises, Inc., supra.* at 817, where the court accepted the claimant's contention that she need not stipulate to the value of the limitation fund itself, but must concede the exclusive right of the district court to determine value. *See also, Complaint of Businelle Towing Corp.*, 539 F.Supp 609, 612 (M.D. La. 1982) ("the determination of the amount of the fund to which [liability] will be limited are hereby specifically reserved to this Courts); *Complaint of Cannon,* 487 F.Supp 26, 28 (S.D. Fla. 1980) ("the value of the vessel can be finally determined when, and if, this Court is presented with the limitation of liability issue.).

In the instant action, Claimants have not conceded the sufficiency of the value of the limitation fund offered by Consol. Therefore, if this Court accepts the reasoning of those decisions which require Claimant to specifically make such a concession before the stay will be lifted, then obviously Claimants herein have not complied with their requirement and the stay cannot be lifted.

Alternatively, in the event this Court should, after review of the applicable authorities, favor the reasoning of those decisions which have not required a stipulation as to the value of the limitation fund before lifting the stay, then Claimants herein must nevertheless concede, in the stipulations which

they do make, that the exclusive right to determine the sufficient and proper value of the limitation fund lies exclusively with this Court.[1] Claimants herein have not specifically conceded that any and all issues regarding the proper valuation of the limitation fund or of the M/V Elizabeth and Barge No. MC 1029 are reserved exclusively for determination by this Court. However, Claimants have offered a stipulation that this Court has sole and exclusive jurisdiction over any and all issues relating to Consol's attempt to limit its liability. If this Court were to formally and affirmatively construe that stipulation in broad fashion so as to include a concession by Claimants that all valuation issues are also reserved for exclusive determination by this Court, the proferred stipulation may be sufficient.

Response to Claimants' Third Stipulation

The third stipulation which Claimants and their counsel make in paragraph 8 of their motion is that they "stipulate that they will confine the Newmans' action to the case pending in the Court of Common Pleas of Allegheny County, Pennsylvania". Consol is currently not certain as to the exact meaning or intent of this particular stipulation, since, on its

1. As this Honorable Court may recall, Claimants herein previously challenged the value of the limitation fund insofar as the number of vessels to be included was concerned. A hearing on Claimants' motion in that regard was held before this Court on December 21, 1990, after which Claimants' motion to increase the value of the fund by including the values of other barges in Consol's empty fleet was denied. However, it is to be noted that under Rule F(7) of the Supplemental Rules for Certain Admiralty and Maritime Claims, Claimants may still challenge the aggregate $120,000.00 value which has been placed on the M/V Elizabeth and Barge No. MC 1029, by requesting an appraisal of those two vessels.

face, it does not appear to relate to any of the stipulations required by the authorities discussed above. However, if this stipulation is an offer by Claimants that they will not institute or pursue any other proceedings against Consol in any other court or forum, then the offer would be proper, since this Court's stay should *only* be lifted, if at all, to allow Claimants to pursue their previously filed *state court suit,* but *not* to allow for the filing of or processing of any other claims or actions.

On the other hand, in the event this stipulation is an attempt to suggest that Claimants are only agreeing to proceed with their state court suit, but are contesting whether they have any further obligation to continue to proceed in the instant exoneration or limitation of liability action, then Consol would suggest that this stipulation is an improper attempt to restrict or confine these proceedings. As the Court will note from a review of the various decisions discussed above, the lifting of this Court's stay against Claimants' state court suit *does not* in any manner act as a dismissal of the instant action or otherwise moot this action. This exoneration from or limitation of liability action will still remain viable and must eventually be resolved and decided.

Even if This Court Should Vacate or Dissolve its Style It Should Only do so in Limited Fashion

In the event this Court should decide, upon proper stipulation from Claimants, that the stay as to Claimants' state court suit should be vacated, dissolved or lifted, the blanket stay may not be lifted in its entirety. In that regard, the stay Order of July 20, 1990 applies to any and all suits, actions or legal proceedings against Consol or the involved vessels arising out of or connected with Mr. Newman's alleged accident of April 27, 1989. This Court's

authority to lift its stay only extends to allowing a single claim Claimant to pursue a previously filed state court action involving the same incident. It does not, however, allow for the lifting of the stay in order to permit the filing or processing of any other claims by a claimant or any other person. Therefore, in the event this Court should decide to lift its stay herein, its Order should be crafted *only* for the limited purpose of allowing Claimants' state court suit to proceed.

Secondly, even as to the lifting of the stay to allow Claimants' state court suit to proceed, this Court should allow the stay to continue in effect against the entry of any judgment against Consol in Claimants' state court suit, and as to any consequent enforcement of any such judgment, pending the outcome of this proceeding for exoneration from or limitation of liability. *See, e.g., In Re Mr. Wayne, supra,* at 1130, where the court ordered the stay lifted to allow the prosecution of the claimant's state court action, but continued the stay in effect against entry of judgment and consequent enforcement of recovery pending the outcome of the limitation proceeding. *See also, Complaint of Dammers & Vanderheide,* 660 F.Supp. 153, 160 (S.D. N.Y. 1987), *aff'd,* 836 F.2d 750 (2d Cir. 1988). The reason for continuing the stay against the entry and enforcement of any judgment against Consol in the state court suit is to protect this Court's sole and exclusive admiralty jurisdiction over any and all issues relevant to exoneration from or limitation of liability.[2]

II. *Claimant's Motion to Stay the Instant Proceeding*

As indicated above, Claimants have not only moved to lift the stay against their pending state court action, but have also

2. This Court may allow the entry of a defense judgment against Claimants and in favor of Consol in the state court suit.

moved this Court to stay the instant proceeding until after the termination of their state court suit.

Gilmore and Black suggest, at page 872, that where a federal court lifts its stay as to a state court suit, "the admiralty court dissolves or modifies its Section 185 injunction to allow the civil action to proceed, meanwhile holding the limitation proceeding in abeyance until the result of the civil action is known." Some district courts, when lifting their injunctions against state court actions, have temporarily closed their limitation of liability files, without prejudice, pending a request to re-open following the conclusion of the state court proceeding, or have otherwise held in abeyance any outstanding motions and pretrial matters pending resolution of the state court proceedings. *See, Kattelman v. Otis Engineering, Corp., supra; In Re Mr. Wayne, supra; Complaint of Tropigas Carriers, Inc., supra.*

Nevertheless, Consol is not aware of any authority which affirmatively *requires* this Court to stay the instant action if this Court should allow Claimants to proceed in state court. In that regard, it is to be noted that, in *Complaint of Cannon, supra,* at 29, the court lifted its injunction as to the state court proceeding and stayed its own limitation action. However, that court also ordered that, in the interim, the court "may take action on those matters that are not subject to determination by the state court."

Consol would respectfully submit that, ultimately, the decision as to whether to impose a stay on all further proceedings in the instant action rests solely within the discretion of this Court. The general rule is that the pendency of an action in a state court is no bar to proceedings concerning the same or a similar matter in a federal court having jurisdiction. Nevertheless,

many courts follow the rule that a federal district court has discretion to stay proceedings on its own docket pending the outcome of a similar suit instituted in a state court. The Supreme Court recognizes this discretion; however, has indicated that its exercise is justified only in exceptional circumstances. *See,* discussion at *Federal Procedure, L.Ed.*, Volume 1, Section 1:558. Factors affecting the decision to grant or deny a stay include, among others, the order in which jurisdiction was obtained, the similarities of the parties, the similarity of issues, avoidance of piecemeal litigation and the convenience of the forums. *See generally, Federal Procedure, supra,* at Sections 1:559-1:564.

It is to be noted herein that, while the parties are the same and the issues may appear to be similar on their face, the legal theories and burdens of proof are different in this action as opposed to those in Claimants' state court suit. It should also be noted that, although it is true that in the event Consol is ultimately successful in obtaining a defense verdict in the state court suit, no further action in this proceeding would be necessary; nevertheless, in the event of a jury award in favor of Claimants in state court, the parties would still return to this Court for a determination of whether Consol should be exonerated from and/or limited with respect to its liability. Under these circumstances, this Court may wish to continue with this proceeding presently, rather than waiting to proceed in the future.

Appendix C

Respectfully submitted,

POLITO & SMOCK, P. C.

By s/ Leonard Fornella
Leonard Fornella

Suite 400
Four Gateway Center
Pittsburgh, PA 15222
(412) 392-3500

Attorneys for Complainant,
Consolidation Coal Company

APPENDIX D — STIPULATION OF CLAIMANTS AND THEIR COUNSEL

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration from or Limitation of Liability

STIPULATION OF CLAIMANTS AND THEIR COUNSEL

Claimants, George Newman and Suzanne M. Newman, his wife, and their Attorney, Paul L. Hammer, Esquire, hereby stipulate and agree to the following:

1. The Claimants waive any claim of *res judicata* based upon any judgment obtained in the State Court proceeding.

2. Consolidation Coal Company shall have the right to litigate all issues relating to its claims of limitation and exoneration of liability in the present proceeding at the above caption.

3. The issue of valuation of the limitation fund shall remain an issue to be resolved by the United States District Court for the Western District of Pennsylvania in the case captioned above.

s/ Paul L. Hammer

Paul L. Hammer
Attorney for Claimants

APPENDIX E — CLAIMANT'S MOTION TO ADOPT THE FINDINGS OF THE JURY AS THE FINDINGS OF THE COURT

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 90-1206

COMPLAINT OF CONSOLIDATION COAL COMPANY, as Owner of the Motor Vessel Elizabeth and as Charterer of Barge Number MC 1029, for Exoneration from or Limitation of Liability

CLAIMANT'S MOTION TO ADOPT THE FINDINGS OF THE JURY AS THE FINDINGS OF THE COURT

AND NOW, comes Claimant, George Newman,* (Mr. Newman) by his attorney, Paul L. Hammer, Esquire, and moves this Honorable Court to adopt the findings of the jury of the Court of Common Pleas of Allegheny County as the findings of this court. In support thereof, Mr. Newman alleges:

1. Complainant, Consolidation Coal Company (Consol) filed this admiralty action to limit its liability, 46 U.S.C. §§181, *et. seq*, on or about July 20, 1990, some six months after Mr. Newman filed a tort personal injury action on the grounds of unseaworthiness and Jones Act, 46 U.S.C. §688 *et. seq*, negligence against Consol, in the Court of Common Pleas of Allegheny County, Pennsylvania at G.D. 90-00980.

2. This court modified the injunction and administratively dismissed this action to accommodate Mr. Newman's right to a jury trial in the state court on or about February 1, 1991.

---

* Suzanne Newman was dropped from the case during the state court proceedings.

Appendix E

3. The jury found in answers to special interrogatories *inter alia* that Mr. Newman's injuries were the legal result of Consol's negligence and the unseaworthiness of its vessels. In addition, the final judgment set damages in excess of $1,000,000.00. A true and correct copy of the jury's answers to special interrogatories is attached hereto as Exhibit 1.

4. Consol's Request for Jury Instruction No. 8 submitted for the jury's decision the factual finding of what knowledge it had or reasonably should have had. Request No. 8 is quoted here:

> The definition of negligence requires the defendant to only guard against those risks or dangers of which it knew or by the exercise of due care should have known. In other words, the defendant's duty is measured by what a reasonably prudent person would anticipate or foresee resulting from particular circumstances.

A true and correct copy of Consol's Request for Jury Instructions is attached hereto as Exhibit 2.

5. The Honorable Patrick McFalls, the state trial judge, granted Consol's said request for instruction No. 8. He told the jury:

> Definition of negligence requires the Defendant only guard against those risks or dangers of which it knew or by the exercise of due care should have known. In other words the Defendant's duty is measured by what a reasonably prudent person would anticipate or foresee resulting from particular

> circumstances. Thus if you find that Plaintiff's injuries occurred as a result of a condition of the line which was not known to the Defendant and by exercise of due care would not have been known or known by or reasonably foreseen by the Defendant, you may find Plaintiff has not satisfied his burden of proving negligence on the part of the Defendant regarding the leaving line.

(Transcript, p. 760). A true and correct copy of Judge McFalls' complete charge is attached hereto as Exhibit 3.

6. Consol's privity and knowledge, actual or constructive, have been found as facts by the jury at Consol's own request.

7. The Superior Court affirmed the verdict and the Supreme Court of Pennsylvania denied Petitions for Allowance of Appeal on May 11, 1995.

8. On or about June 29, 1995, Consol conceded:

> Complainant concurs with Claimant in his assertion that, with the exception of issues concerning post-judgment interest and litigation costs relative to the State Court proceeding, said matter is effectively concluded for purposes of the within litigation.

(Complainant's Response to Claimant's Motion to Restore Case to Active Status and Request for Status Conference filed on or about June 29, 1995, page 2.)

9. There is now a state court judgment, which Consol conceded on or about June 29, 1995 is final.

10. A decision to reexamine the facts found by the jury or the judgment of the Pennsylvania courts in this case would necessarily require a determination of the Federal constitutional questions, *inter alia,* listed below.

11. The Seventh Amendment to the Constitution of the United States of America precludes a reexamination of the facts found by the jury in these circumstances. No court has jurisdiction to redetermine those facts found by the jury.

12. The Pennsylvania judgment is entitled to full faith and credit via Article IV, Section I of the Constitution of the United States of America, which Congress has applied to the Federal Courts, 28 U.S.C. §1738.

13. Consideration of federalism and comity bar an intrusion by the lower federal courts into the judgment of the courts of the Commonwealth of Pennsylvania in this controversy.

14. Additionally, sound judicial economy would not be served by a wasteful second trial on the established facts in this lengthy litigation.

15. No federal court other than the Supreme Court of the United States has jurisdiction to review the judgment of the courts of the Commonwealth of Pennsylvania in this dispute. Hence, this Honorable Court lacks such jurisdiction.

16. Throughout the course of the litigation in state court Consol repeatedly and consistently argued that it did not inspect the rope that failed, causing Mr. Newman's injuries. A true and correct copy of that part of Consol's brief in Support of Its Motion for Post-trial Relief is hereto attached as Exhibit 4.

Appendix E

17. The rope involved in this case was on the open deck of Consol's vessel and easily could have been inspected.

18. The jury's finding that Consol unreasonably failed to inspect the rope involved precludes a contrary finding. Therefore, that fact is established for the purposes of this case.

19. Consol waived the protection of this court's injunction by actually litigating and submitting the knowledge issue to the jury for decision. Consol's claim of lack of privity and knowledge is inextricably intertwined with the merits of the state court judgment and review of the state court's decision is forbidden.

20. A decision to reject the jury's findings in this federal litigation would necessarily deprive Mr. Newman of his right to a jury trial which was the essential purpose for the February 1, 1991 modification of the injunction through application of the "saving to suitors" clause U.S.C. §1333.

21. Consol is judicially estopped from arguing to this Honorable Court that it reasonably inspected the rope involved after it maintained the opposite position throughout the Pennsylvania courts.

Respectfully submitted,

s/ Paul L. Hammer
Paul L. Hammer
Attorney for Claimant

APPENDIX F — EXCERPTED BRIEF FOR APPELLANT

IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 96-3434

COMPLAINT OF CONSOLIDATION COAL COMPANY, as OWNER OF THE MOTOR VESSEL ELIZABETH and as CHARTERER OF BARGE NUMBER MC 1029, FOR EXONERATION FROM OR LIMITATION OF LIABILITY

BRIEF FOR APPELLANT

APPEAL OF GEORGE NEWMAN, APPELLANT FROM THE ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA DATED JULY 17, 1996

CIVIL ACTION NO. 90-01206

PAUL L. HAMMER, ESQUIRE
PA I.D. No. 10415
SUZANNE M. SWAN, ESQUIRE
PA I.D. No. 46183
518 Frick Building
Pittsburgh, PA 15219
(412) 261-0906

* * *

Appendix F

B. IN THE ALTERNATIVE, THE TRIAL COURT ERRED IN EFFECTIVELY REQUIRING MR. NEWMAN TO STIPULATE TO A RETRIAL OF HIS JONES ACT AND UNSEAWORTHINESS CASE AS A CONDITION PRECEDENT TO LIFTING THE STAY FORBIDDING HIM TO PROSECUTE HIS STATE COURT CASE.

Mr. Newman was confronted with an *ex parte* federal injunction forbidding him to proceed with his state court *in personam* action. In January 1991, he faced the Hobson's choice of losing his common law rights altogether or executing the stipulation the court ordered. This Court held an order refusing to dismiss a limitation action was not appealable. *In Re Bave's Petition,* 314 F.2d 335 (3rd Cir. 1963). The Court held in 1987 only orders determining the merits of the petition or defenses were appealable. *Kingstate Oil v. M/V Green Star,* 815 F.2d 918 (3rd Cir. 1987).

On appeal from final judgment, an appellate court may ordinarily consider all prior rulings of the trial court. *United Coal Companies v. Powell Const. Co.,* 839 F.2d 958 (3rd Cir. 1988). The rule in this Circuit is that although a party may appeal an order denying a jury trial, he does not waive his jury trial right by waiting instead of taking an immediate appeal. *E.E.O.C. v. Corry Jamestown Corp., 719* F.2d 1219 (3rd Cir. 1983). *See also* Wright, Miller & Kane, *Federal Practice & Procedure* §2962 ("upon an appeal from the final decree, every interlocutory affecting the rights of the parties is subject to review in the appellate court")

The order forcing Newman to stipulate that Consol could litigate the Jones Act and unseaworthiness case in the limitation forum was dated January 29, 1991, more than a year and one

half before the decision in *Gorman v. Cerasia, supra*, of August 16, 1993, which was long after the thirty day appeal period and. [sic] The order was erroneous, pursuant to *Gorman,* and violated Newman's rights under the saving to suitors clause, the Seventh Amendment, the Jones Act and maritime law. However, Mr. Newman had no choice but to sign on the dotted line.